ANN ERHARDT

IBLA 85-51 Decided November 24, 1986

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application. NM-58766.

Reversed.

1. Oil and Gas Leases: Applications: Filing--Oil and Gas Leases: Applications: Drawings

A simultaneous oil and gas application which is filled out, signed, dated, and submitted by the applicant is improperly rejected for failure to disclose filing service assistance notwithstanding the fact the check tendered for the filing fees is drawn by a firm which provided the applicant with parcel recommendations where the funds were advanced by the applicant.

APPEARANCES: Mike L. Halpern, Esq., Glenn Ullin, North Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ann Erhardt has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated September 19, 1984, rejecting her simultaneous oil and gas lease application, NM-58766.

Appellant's lease application was drawn with first priority for parcel NM-202 in the September 1983 simultaneous oil and gas lease drawing. The Part B application form (Form 3112-6a (June 1981)) does not indicate appellant received the assistance of a filing service in the preparation of the application. In its September 1984 decision, BLM stated it had "determined that Atlantic Oil and Gas [Atlantic], 16635 NE 19th Avenue, Miami, FL 33162 provided you assistance in filing your application" and rejected appellant's lease application pursuant to 43 CFR 3112.4 because appellant had failed to disclose the filing service's name and address on the application as required by 43 CFR 3112.2-4.

That regulation provides: "Any applicant receiving the assistance of any person or entity which is in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program shall indicate on the lease application the name of the party or filing service

that provided assistance." 43 CFR 3112.2-4. The definition of "person or entity in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program," includes "those enterprises, commonly known as filing services, which sign, formulate, prepare or otherwise complete or file applications for oil and gas leases for consideration." 43 CFR 3112.0-5.

In her statement of reasons for appeal, appellant states Atlantic had previously assisted her in "completing" applications but the application at issue herein "was filed without assistance from Atlantic." (Emphasis in original.)

By order dated February 28, 1986, we requested BLM to submit "an explanation * * * of how it determined that Atlantic [had] provided assistance to appellant" and to address the question of why BLM regarded any assistance rendered by Atlantic as constituting assistance provided by a filing service as defined in 43 CFR 3112.0-5, particularly in light of our decision in Ronald Valmonte, 87 IBLA 197 (1985). We also required appellant to "provide a copy of any agreement she had with Atlantic which was in effect during September 1983, including the amount of consideration paid and the services provided by Atlantic for that consideration."

On March 24, 1986, BLM responded to the Board's request, stating it had determined Atlantic had provided assistance to appellant from the identical preaddressed envelopes and filing fee checks, all dated September 9, 1983, and drawn on the Central Bank and Trust Company (Miami, Florida), submitted by appellant as well as other applicants in the September 1983 drawing who had acknowledged receiving the assistance of Atlantic. BLM argued:

> In Ronald Valmonte [supra], the Board reversed our decision which rejected Mr. Valmonte's applications for failure to list Wesco [Wesco Oil Properties] as a filing service. The Board concluded that Wesco was not a filing service within the definition of the regulations because Mr. Valmonte completed his own Part B and submitted his own remittance. The Board stated: "...Wesco neither filled in any part of Part B nor sent any remittance for the filing fees. Rather, completion of Part B and the submission of a remittance were the sole responsibility of appellant."
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> We conclude that Ms. Erhardt darkened all the circles on the Part B herself, signed the application, and mailed it to us. However, unlike Mr. Valmonte, Ms. Erhardt submitted with her application a check made out from Atlantic Oil & Gas Corp. payable to the Bureau of Land Manag[e]ment in the amount of $150 to cover the two parcels recommended by them for her. Ms. Erhardt did not submit an additional personal check to cover any additional filings she might have chosen on her own.
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> We infer from the Board's language in Valmonte that either condition (filling out the Part B or sending the remittance) would result in meeting the definition of a filing service. Although

> Ms. Erhardt transmitted the check, the check itself was prepared by Atlantic Oil & Gas Corp. and was drawn on their account. Thus it was not Ms. Erhardt's remittance and she had no real control over it.
>
> In conclusion, it is our opinion that Ms. Erhardt used the services of Atlantic Oil & Gas Corp., which is indeed a filing service within the meaning of the regulations. [Emphasis in original.]

Appellant in response to our order, submitted an original document captioned "Advisory Agreement." The agreement is between Atlantic Oil and Gas Corporation and Ann and Ralph Erhardt. It is dated January 5, 1983, and was in effect at the time of the September 1983 drawing. The agreement provides that, in consideration of the sum of $1,631, Atlantic will provide "advisory services" in the form of seven parcel "recommendations" and "[e]very filing period [Atlantic] will mail to the Client parcel recommendations with the filing fees to be paid to the appropriate agency." (Emphasis added.) Appellant also submitted a copy of a September 9, 1983 letter "sent to Applicant by Atlantic" which set forth Atlantic's parcel recommendations and instructs appellant to complete Part B of the lease application and to mail it in the preaddressed envelope to BLM. In addition, the letter instructs appellant to include "your AO & GC [Atlantic] voucher check made payable to the Bureau of Land Management with you as the remitter."

This is a case of first impression with the Board. We have previously reversed decisions rejecting applications under the regulation at 43 CFR 3112.0-5 for failure to disclose filing service assistance where recommended parcel numbers provided by a firm were utilized by the applicant when the applicant filled out and signed the application, submitted the application to BLM, and paid the filing fees. Ronald Valmonte, 87 IBLA 197 (1985); accord, Joseph W. Crowley, 92 IBLA 75 (1986); Richard J. Lyons, 92 IBLA 54 (1986). 1/ On the other hand, we have upheld rejection of an application for failure to disclose filing service assistance where the firm used by the applicant both prepared (filled out) the application and paid the filing fee, leaving the applicant to sign, date, and mail the application. James D. Buergel, 88 IBLA 168 (1985). In John G. O'Leary, 86 IBLA 131 (1985), the Board affirmed rejection of an application prepared by a firm on applicant's behalf where the check in payment of the filing fee, although signed by the applicant, was drawn on the firm's account.

Thus, the critical issue to resolution of this appeal is whether the drawing of a check in payment of the filing fee by a firm on applicant's behalf, as opposed to filling out or preparing the application, constitutes "sign[ing], formulat[ing], prepar[ing], or otherwise complet[ing] or fil[ing] applications" as defined at 43 CFR 3112.0-5. BLM has taken the position that either payment of the filing fee or filling out the application brings a firm within the definition of a filing service.

1/ In each of the cited cases, the firm provided the mailing envelope in which the applicant forwarded his application to BLM.

The difficulty arises from the wording of the relevant regulation. While at one time the regulation which defined the term "person or entity in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program" i.e., 43 CFR 3100.0-5(d) (1982), covered entities which "offer advice on formulation or preparation [or which] mail, deliver [or] receive mail," this phrase was deleted in the revised and repromulgated regulation at 43 CFR 3112.0-5 (48 FR 33678 (July 22, 1983)). The latter regulation provides that the term currently means:

> [T]hose enterprises, commonly known as filing services, which sign, formulate, prepare or otherwise complete or file applications for oil and gas leases for consideration. All other services such as general secretarial assistance or general geologic advice whether or not it is specifically related to Federal lease parcels or leasing, are excluded from this definition.

43 CFR 3112.0-5. Thus, as we noted in Ronald Valmonte, supra at 201, the revised definition not only deleted the requirement to disclose firms which provided advice for compensation, but expressly stated that with the exception of those firms "which sign, formulate, prepare or otherwise complete or file applications," all other services such as general secretarial assistance or general geologic advice, whether or not related to specific Federal lease parcels, are excluded from the definition.

Thus, the issue is whether our holding in Ronald Valmonte, supra, should be narrowed to reject a simultaneous oil and gas lease application which was filled out, signed, and dated by the applicant in reliance on advice regarding parcel selection merely because the firm making the parcel recommendations drew the filing fee check from applicant's account. Although the check was drawn on Atlantic's bank account, it appears from the record that the filing fee funds were advanced by the applicant prior to the time the check was written. The writing of checks by an agent on the applicant's account falls within the definition of general secretarial assistance.

This Board has frequently held that where an applicant is to be deprived of a statutory right because of his failure to comply with the requirements of a regulation, that regulation should be set forth with such clarity that there is no reasonable basis for noncompliance. Brian D. Haas, 66 IBLA 353 (1982). The terms of the regulation do not support its application to the facts of this case. If the identity of the payor is a critical factor in determining qualifications, then the regulation should make that clear.

In this regard, we note the former regulation at 43 CFR 3112.4-1 (1982) provided the rental shall be paid and lease offers signed only by the applicant or his attorney-in-fact who must be barred from filing offers on behalf of any other applicant. This regulation was applied by the Board to reject an offer where lease offers were signed and payment was tendered by an attorney-in-fact who acted on behalf of more than one offeror. Amy Polak, 79 IBLA 391 (1984); Kirk Rhone, 76 IBLA 332 (1983). However, the Board found this regulation too ambiguous to support rejection of an offer on the sole ground the rental was paid by the offeror's father, finding:

> [T]he term "paid by the applicant" could embrace a definition that the actual payment need not be made by the applicant directly so long as he has either recompensed the payor or obligated himself to recompense the payor. [Otherwise,] since a cashier's check is actually an obligation of the issuing bank, submission of a cashier's check actually could be treated as payment by the bank rather than the applicant, despite the fact that the applicant purchased the check.

Brian E. Haas, supra at 354. Finding in light of the preamble to the final rulemaking that the term "paid by the applicant" could also mean the payment was merely submitted to BLM by the offeror or at his direction, the Board reversed the BLM decision rejecting the offer on the ground the applicant should not be penalized for failure to comply with a regulation "where it is virtually impossible to ascertain exactly what is proscribed." 66 IBLA at 355. A fortiori, where the regulation does not require payment by the applicant, we cannot uphold rejection of appellant's application on the ground the check for filing fees was drawn on the applicant's account by the firm which provided the applicant with parcel recommendations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

ADMINISTRATIVE JUDGE FRAZIER DISSENTING:

I respectfully dissent. As the majority notes, the Board has not specifically addressed the question of whether an applicant who otherwise personally prepares a lease application, but who submits a check prepared by a service in payment of the filing fee, has received the assistance of a filing service under 43 CFR 3112.0-5 and, thus, is required to disclose the name of that service in accordance with 43 CFR 3112.2-4. In Ronald Valmonte, 87 IBLA 197 (1985), the applicant, under an agreement with Wesco, had prepared the lease application and paid the filing fee with his personal check. Wesco had merely provided a list of parcel recommendations. We concluded that the applicant had not received the assistance of a filing service in terms of formulating his lease application even though the applicant had chosen only those parcels recommended by Wesco. We stated that the latter fact "should not be permitted to obscure the fundamental reality that this was his free choice." Ronald Valmonte, supra at 202; see also Glen E. McCuistion, 89 IBLA 228 (1985). By contrast, in James D. Buergel, 88 IBLA 168 (1985), we concluded that the applicant had received the assistance of a filing service where Oil and Gas Properties, Inc., had prepared the lease application and the filing fee check and the applicant's only responsibility had been to sign the application. We specifically stated therein that: "The acts of Oil and Gas Properties, Inc., in completing the application and preparing the remittance with the proper amount to cover the filing fees, qualified it as a filing service within the meaning at 43 CFR 3112.2-4." (Emphasis added.) James D. Buergel, supra at 170.

In determining whether an applicant has received the assistance of a filing service within the purview of 43 CFR 3112.2-4, thus necessitating disclosure, it is crucial to decide whether the service has provided assistance as described in 43 CFR 3112.0-5. The fact that the assistance provided has been done "for consideration" is often beyond question. The real question is what is the nature of the assistance rendered. In order to come within the meaning of 43 CFR 3112.0-5, a service must either "sign, formulate, prepare or otherwise complete or file applications for oil and gas leases." In order to be considered a filing service under 43 CFR 3112.0-5, a service must, therefore, generally exercise some control over lease applications by either preparing or filing them. Indeed, where a service had the ability to determine whether to file a particular application or, moreover, what parcels to apply for, disclosure would appear to be warranted under 43 CFR 3112.2-4.

Here Atlantic sent appellant a list of two parcel recommendations with a prepared check made payable to BLM to cover filing fees. This is obviously the package Atlantic offers to its clients. Indeed, the service agreement indicates that the fees charged clients include an amount to cover filing fees. The agreement states: "Client filing fee deposited in 'Special account.'" Having paid for a specific number of recommendations and advanced filing fees to cover them, it is reasonable to conclude that the free will exercised by the applicant in Valmonte is significantly diminished where, as here, the number of parcels recommended are accompanied by a prepared check.

I read 43 CFR 3112.0-5 to encompass the situation where a service has rendered assistance in the form of "complet[ing]" an application by preparing a filing fee check to cover recommended parcels, which is then merely forwarded by the applicant.

Departmental regulations regarding the simultaneous oil and gas leasing system have long contained a requirement that lease applications be "completed" in accordance with other applicable regulations. See 43 CFR 3112.2-1(a) (1980). In the absence of compliance with such other regulations, an application would be deemed not "completed." Joshua Basin Partnership, 87 IBLA 179, 182 (1985) (applying 43 CFR 3112.2-3 (1982) requiring disclosure of other parties in interest). At the time of the September 1983 drawing involved herein, 43 CFR 3112.2-1(a) (1983) provided that a simultaneous oil and gas lease application "consists of a[n] * * * application on the form approved by the Director, completed, signed and filed pursuant to the instructions in the application form and to the regulations in this subpart." (Emphasis added.) In addition, 43 CFR 3112.2-1(g) (1983) provided that an application will afford an applicant no rights under a drawing "if it has not been completed * * * in accordance with the other requirement[s] of Subpart 3112 of this title." Moreover, at that time, 43 CFR 3112.2-2 (1983) required that each filing "be accompanied by a nonrefundable filing fee of $75 for each parcel." 1/ These regulations are essentially unchanged today. Thus, an essential element of completing an application at the time of the September 1983 drawing was submitting the necessary filing fee. See also 43 CFR 3112.3(c) (1983). Where a service has prepared a check in payment of the filing fee to be forwarded by the applicant, it should be deemed to have completed an application within the meaning of 43 CFR 3112.0-5. Howard K. Davis, 70 IBLA 7 (1983). Where it does so for consideration, its name must be disclosed in accordance with 43 CFR 3112.2-4.

This approach which I advance fully comports with the purposes of the disclosure requirement. On August 19, 1983, the Department published a Federal Register notice at 48 FR 37656, stating its intent to "strictly enforce the provisions of amended * * * § 3112.2-4 which pertain to filing assistance." The stated purpose for the strict enforcement was to "preserve the integrity of the simultaneous oil and gas lease program by ensuring against multiple filings on a single parcel as prohibited by amended § 3112.5-1." The Department stated in the Federal Register that 43 CFR 3112.2-4 "requires identification of any party rendering any type of assistance in the filing of an application submitted under Part 3112." 48 FR 37656 (Aug. 19, 1983). Indeed, a check prepared by a service and drawn on its account inevitably suggests that the service has some financial interest in the lease application. Disclosure is required in order that BLM may

1/ One of the instructions on appellant's Part B application form was to file the form "together with" the filing fee. As noted supra, 43 CFR 3112.2-1(a) (1983) also required that an application be completed "pursuant to the instructions in the application form." See also 43 CFR 3112.2-1(g) (1983); Tillman V. Jackson, 80 IBLA 225 (1984).

inquire further into the nature of any agreement between the applicant and the service, whether the service has any interest and ultimately whether the service has engaged in a prohibited multiple filing. In order to best facilitate this inquiry, applicants must routinely disclose on lease applications the identity of all services that make it a practice of preparing filing fee checks for their clients. Moreover, a general requirement of disclosure backed up by the automatic rejection of an application which does not contain such a disclosure is the only effective way to ensure disclosure and, thus, to police the system in an effort to further ensure that no multiple filings take place. See Carl S. Matuszek, 86 IBLA 124 (1985).

Appellant has not denied forwarding a check prepared by Atlantic in payment of the filing fee in the September 1983 drawing. In an affidavit dated April 1, 1986, appellant states that "the only reason a cashier's check was used is that Atlantic had [her] funds; in other words, Atlantic was only sending back the affiant's own funds to be used in filing." Despite the fact that appellant was listed as the remitter on the check, I conclude that Atlantic thereby "completed" appellant's lease application within the meaning of 43 CFR 3112.0-5 when the check prepared by Atlantic was mailed to BLM in payment of the filing fee and that appellant was required to disclose the fact that Atlantic had rendered this assistance as much as if Atlantic had prepared the application itself and appellant had merely signed and mailed it. In the absence of such disclosure, I would hold that BLM properly rejected appellant's lease application. William Reppy, 90 IBLA 80 (1985); John G. O'Leary, 86 IBLA 131 (1985); see Shaw Resources, Inc., 79 IBLA 153, 91 I.D. 122 (1984).

Gail M. Frazier
Administrative Judge